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No. 09-723

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AURELIUS CAPITAL PARTNERS, LP, *et al.*,

Petitioners,

—v.—

THE REPUBLIC OF ARGENTINA,

ARAUCA BIT AFJP S.A., *et al.*,

ADMINISTRACIÓN NACIONAL DE SEGURIDAD SOCIAL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Aurelius Capital Master, Ltd., Aurelius Capital Partners, LP, and Blue Angel Capital I LLC (collectively the "Aurelius Parties" or "Petitioners"), joined by numerous Individual Bond Holders, respectfully submit this Reply pursuant to Rule 15.6 of this Court's Rules, to address procedural arguments newly advanced by Respondents The Republic of Argentina (the "Republic") and Administración Nacional de Seguridad Social ("ANSES") in their respective briefs in opposition to the Petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Respondents contend that the question presented by Petitioners was not preserved below or passed upon by the Second Circuit Court of Appeals. *See* Brief in Opposition of The Republic of Argentina ("Republic Opp'n Br.") at 3-4, 23-24, 26-27; Brief in Opposition for Respondent ANSES ("ANSES Opp'n Br.") at 25 & n.11. Specifically, the Republic and ANSES submit that the Aurelius Parties never previously argued that the pension assets were nationalized *in situ* and "in kind" and claim that this position "is directly at odds" with the Aurelius Parties' observation in the Court of Appeals that the Republic planned to repatriate the nationalized assets after assuming legal ownership of them. Republic Opp'n Br. at 23 (purporting to quote from the Aurelius Parties' Second Circuit brief, without providing a copy of it); ANSES Opp'n Br. at 25. Respondents are incorrect.

The Aurelius Parties squarely and repeatedly presented in their briefing to the Second Circuit Court of Appeals that the nationalization legislation, by its

terms (and as has never been in dispute), "provide[d] for financial institutions, securities depositories, mutual fund companies and any other third-party custodian where the private pension assets are held to establish ANSES as the 'sole and exclusive holder of those assets and rights' ";[1] that the " 'resources comprising the individual capitalization accounts"—*i.e.*, the nationalized private pension assets, including those invested through commercial accounts in New York—were therefore "expressly 'transferred in kind' to ANSES to 'become part of' ANSES's existing Guarantee Fund";[2] and, accordingly, that such assets met both the New York law definition of an attachable property interest of the Republic[3] and the FSIA definition of property "used for a commercial activity in the United States."[4]

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[1] Brief of Plaintiffs-Appellees Aurelius Capital Partners, LP, *et al* to the Second Circuit Court of Appeals, dated March 18, 2009 ("Aurelius 2d Cir Br "), at 18; *id* at 1 (Counterstatement of Issues (2)) ("Did the District Court correctly conclude that cash, stocks, bonds and other liquid securities held in custodial or other investment accounts in the United States are property of the Republic as a result of legislation transferring and assigning exclusive title and plenary control of those assets from private pension funds to the Executive Branch of the Argentine Government?"); App 90a

[2] Aurelius 2d Cir Br at 35-36; 90a (specifying that the transfer occurred "as a matter of law, in the same kind as that in which they [the nationalized pension assets] are invested [already])"

[3] Aurelius 2d Cir Br at 35-39

[4] *Id* at 48-56, *id* at 1 (Counterstatement of Issues (4)) ("Did the District Court correctly conclude that assets held in custodial or other investment accounts in the United States and used for investments in market-traded securities, including stocks and bonds, are 'used for a commercial activity in the United States' within the meaning of the Foreign Sovereign Immunities Act?")

Moreover, the Second Circuit's decision squarely passed upon the issue presented by explicitly acknowledging that the nationalization legislation "mandat[ed] that the majority of the funds previously administered by the private corporations be transferred ***in kind*** to the Guarantee Fund administered by [ANSES]", but nevertheless holding as a matter of law under the FSIA that the Republic did not "use" the assets for a commercial activity as a result of the transfer of their legal ownership "in kind" to ANSES. App. 9a-10a (emphasis added), 20a; *see Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[E]ven if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice "permit[s] review of an issue not pressed so long as it has been passed upon . . . .") (citations omitted); *U.S. v. Williams*, 504 U.S. 36, 42-43 (1992) ("Here, the Court of Appeals expressly ruled on the question, in an appropriate exercise of its appellate jurisdiction; it is therefore entirely proper in light of our precedents for the Court to reach the question on which it granted certiorari . . . .").

Nor have Petitioners been inconsistent about their view of the case. The fact that the Republic may intend to zero out and close the transferred investment accounts and repatriate the pension assets following their nationalization "in kind" is not "directly at odds" with Petitioners' argument that the Republic necessarily "uses" the pension assets for a commercial activity in the United States by nationalizing them "in kind" as already invested *before* repatriating them—which repatriation itself would require commercial use of the accounts in order to accomplish. *See* Pet. for Writ of Certiorari at 22-23 (observ-

ing that the Republic would have to liquidate the existing investments it chose to acquire *in situ* and in kind before doing anything different with those assets).

Petitioners' "second" issue presented in their Petition—the procedural "catch-22" that the Court of Appeals' decision creates for judgment creditors of foreign states who are left unable to restrain assets they locate in the United States long enough for a federal court to address whether the assets are immune from attachment/execution under the FSIA —is also squarely presented by the Petition. While Respondents characterize this issue as being "second" to and separate from the first, Petitioners presented the issue as part and parcel of the first. Petitioners are not, as the Republic suggests, seeking review of the validity of the restraining orders that were entered, a separate issue that the Court of Appeals purported not to reach (but necessarily did reach by holding that those orders prevented the Republic from "using" the pension assets for a commercial activity, which the orders could not have done unless they were valid and effective when entered). Rather, the issue presented in the Petition is whether the Court of Appeals effectively eviscerated Section 1610(a)'s exception to sovereign immunity by holding that an order designed only to prevent removal of property of a foreign state from the United States long enough to determine if that property falls within the exception to sovereign immunity, itself renders the property immune from attachment and execution (but without which restraint the property could be removed from the United States rendering it immune and leaving creditors without the remedy Congress intended them to have under the FSIA). The Court of Appeals' deci-

sion on the merits squarely presents that predicament, warranting review by this Court for all of the reasons Petitioners have expressed.

CONCLUSION

For the reasons set forth in the Petition and above, the Petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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